

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on
the twenty-sixth day of May, in the year two thousand and nine :
present,

HON. MARGARET H. MARSHALL)	
)	
HON. RODERICK L. IRELAND)	
)	
HON. FRANCIS X. SPINA)	Justices
)	
HON. JUDITH A. COWIN)	
)	
HON. ROBERT J. CORDY)	
)	
HON. MARGOT BOTSFORD)	
)	
HON. RALPH D. GANTS)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby
amended as follows:

Rule 3:07

By striking out Mass. R. Prof. C. 8.5 and
inserting in lieu thereof the new Rule 8.5
attached hereto.

The amendments accomplished by this order shall take effect on July 1, 2009.

<u>MARGARET H. MARSHALL</u>)	
)	
<u>RODERICK L. IRELAND</u>)	
)	
<u>FRANCIS X. SPINA</u>)	
)	Justices
<u>JUDITH A. COWIN</u>)	
)	
<u>ROBERT J. CORDY</u>)	
)	
<u>MARGOT BOTSFORD</u>)	
)	
<u>RALPH D. GANTS</u>)	

Mass. R. Prof. C. 8.5

Disciplinary Authority; Choice Of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a governmental tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's principal office is located shall be applied, unless the predominant effect of the conduct is in a different jurisdiction, in which case the rules of that jurisdiction shall be applied. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

[1A] In adopting Rule 5.5, Massachusetts has made it clear that out-of-state lawyers who engage in practice in this jurisdiction are subject to the disciplinary authority of this state. A great many states have rules that are similar to, or identical with, Rule 5.5, and Massachusetts lawyers therefore need to be aware that they may become subject to the disciplinary rules of another state in certain circumstances. Rule 8.5 deals with the related question of the conflict of law rules that are to be applied when a lawyer's conduct affects multiple jurisdictions. Comments 2-7 state the particular principles that apply.

[1B] There is no completely satisfactory solution to the choice of law question so long as different states have different rules of professional responsibility. When a lawyer's conduct has

an effect in another jurisdiction, that jurisdiction may assert that its law of professional responsibility should govern, whether the lawyer was physically present in the jurisdiction or not.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, paragraph (b) provides that any particular act of a lawyer shall be subject to only one set of rules of professional conduct, makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of the appropriate regulatory interests of relevant jurisdictions, and provides protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a government tribunal, the lawyer shall be subject only to the rules of the government tribunal, if any, or of the jurisdiction in which the government tribunal sits unless the rules of that tribunal, including its choice of law rule, provide otherwise. By limiting application of the rule to matters before a government tribunal, e.g. a court or administrative agency, parties may establish which disciplinary rules will apply in private adjudications such as arbitration.

[4A] As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, the choice of law is governed by paragraph (b)(2). Paragraph (b)(2) creates a "default" choice of the rules of the jurisdiction in which the lawyer's principal office is located. There are several reasons for identifying such a default rule. First, the jurisdiction where the lawyer principally practices has a clear regulatory interest in the conduct of such lawyer, even in situations where the lawyer's conduct affects other jurisdictions. Second, lawyers are likely to be more familiar with the rules of the jurisdiction where they principally practice than with rules of another jurisdiction, even if licensed in that other jurisdiction. Indeed, most lawyers will be licensed in the jurisdiction where they principally practice, and familiarity with a jurisdiction's ethical rules is commonly made a condition of licensure. Third, in many situations, a representation will affect many jurisdictions, such as a transaction among multiple parties who reside in different jurisdictions involving performance in yet other jurisdictions. The selection of any of the jurisdictions that are affected by the representation will often be problematic.

[4B] There will be some circumstances, however, where the predominant effect of the lawyer's conduct will clearly be in a jurisdiction other than the jurisdiction in which the lawyer maintains his or her principal office. Accordingly, paragraph (b)(2) provides that when the predominant effect of the lawyer's conduct is in a jurisdiction other than the jurisdiction in which the lawyer's principal office is located, the ethical rules of such other jurisdiction apply to such conduct. For example, when litigation is contemplated but not yet instituted in another jurisdiction, a lawyer whose principal office is in this jurisdiction may well find that the rules of that jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in that jurisdiction. Likewise, under Rule 8.5(b), when litigation is contemplated and not yet begun in this jurisdiction, a lawyer whose principal office is in another jurisdiction may well find that the rules of this jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in this jurisdiction.

[4C] A lawyer who serves as in-house counsel in this jurisdiction pursuant to Rule 5.5, and whose principal office is in this jurisdiction will be subject to the rules of this jurisdiction unless the predominant effect of his or her conduct is clearly in another jurisdiction.

[5] The application of these rules will often involve the exercise of judgment in situations in which reasonable people may disagree. So long as the lawyer's conduct reflects an objectively reasonable application of the choice of law principles set forth in paragraph (b), the lawyer shall not be subject to discipline under this Rule.

[6] If this jurisdiction and another jurisdiction were to proceed against a lawyer for the same conduct, they should identify and apply the same governing ethics rules. Disciplinary authorities in this jurisdiction should take all appropriate steps to see that they do apply the same rule to the same conduct as authorities in other jurisdictions, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Moreover, no lawyer should be subject to discipline in this jurisdiction for violating the regulations governing advertising or solicitation of a non-U.S. jurisdiction where the conduct would be constitutionally protected if performed in this jurisdiction.